

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	Docket No. 96-RDD-1890
Implementation of Restructuring)	
Legislation (Public Utilities)	
Code § 381, [AB 1890]): RD&D)	
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COMMITTEE WORKSHOP
RE: PROPOSED RD&D LEGISLATION

Monday
June 9, 1997
1:10 P.M.

1516 Ninth Street
Sacramento, California
Hearing Room A

REPORTED BY:

S. RICE, CER 00160

COMMISSIONERS PRESENT

DAVID A. ROHY, Presiding Member

ROBERT A. LAURIE

STAFF PRESENT
(Alphabetically Listed)

David Abelson

Kelly Birkinshaw

William Chamberlain

Mike DeAngelis

Bob Eller, Advisor

Ronald Kukulka

Tom Tanton, Advisor

ALSO PRESENT
(Alphabetically Listed)

Donald W. Aitken, Union of Concerned Scientists

Timothy D. Anderson, Unocal Corporation

Carl Blumstein, UC Energy Institute

David Duchane, Los Alamos National Laboratory

Paul H. Eichenberger, Energy Research Corp.

Steve Hastings, San Diego State University

Ted H. Heath, Southern California Edison

John K. Jess; Jess, Lindsley & Associates, rep. Waste Energy Integrated Systems

Drake Johnson, Consultant

Robert L. Judd, Cal-Tech Management Association

Charles K. Lombard, Waste Energy Integrated Systems

James L. Lucas, Hass-Cal Industries, Inc.

Leo R. Mariano, Pelco Consulting

David Modisette, University of California

Orville Moe, Energy 2000

Robert M. Mucica, Boeing

Thomas D. O'Connor, Southern California Edison

Alvin S. Pak, Electric Power Research Institute

Neil R. Raskin, CeraFilter Systems

Max Sherman, Lawrence Berkeley National Laboratory

ALSO PRESENT
(Continued)

Jane Hughes Turnbull, Peninsula Energy Partners

Steven R. Vosen, Sandia National Laboratories

Carl Weinberg, Weinberg Associates

Daniel D. Whitney, Sacramento Municipal Utility District

John Williams, San Diego State University

Tom Willoughby, Pacific Gas and Electric

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P R O C E E D I N G S

PRESIDING COMMISSIONER ROHY: Good afternoon. I'd like to begin this workshop.

My name is David Rohy; I'm on the R&D Committee. With me is Commissioner Laurie, also on the R&D Committee; and to my left is Tom Tanton, Advisor in my office.

I want to thank all of you for taking time to come to this workshop and assist the R&D Committee and the Commission with refining the proposed language for implementing the RD&D provisions of AB 1890.

I notice we are getting blue cards up here now. And anyone else who wishes to speak, please prepare one of these blue cards and either bring it to the public advisor or -- one more? Thank you. We'll take your comments in order.

As you know, the Commission adopted a Strategic Level Plan on May 28th. The adoption of the Plan that was proposed, the R&D Committee originated with the working group, and changes were made subsequently by the Committee and subsequently in the hearing by the full Commission.

But basically, the areas of change in particular were the making it clear that system reliability R&D should be an important element of the Commission's portfolio. And we're not here today to reconsider that adopted language. The Commission has accepted that. But we are here to work to ensure that the legislative language we send forward accomplishes the intent of and comports with AB 1890 and the Commission's adopted Strategic R&D Plan.

We expect that final copies of the Strategic RD&D Plan reflecting the changes that I just mentioned will be available by the end of this week or possibly early next week. So that we're all working at a minor disadvantage on that, but I think I explained the major change in there and

most of you are aware of that. But if you'd like to see a preliminary copy, we have one copy, I believe -- Tom, do you have that? -- that could be used.

There are two groups of changes to the legislative language which we'd like to discuss today. The first group deals with administrative issues such as: appropriate time frames, Administrative Procedures Act, contract streamlining. And the second group has to do with program content.

I note that last week there was a draft perhaps that some of you may have seen and it may have confused some of you. And just for getting the discussion going today, I want to make sure that you understand that that is not a Committee draft. It is not a Commission draft. I personally have not seen it nor read it, and I would like to work today on the basis of the May 14th comments which I believe are now out in the lobby area. Is that correct, Mike?

MR. DE ANGELIS: Yes. I think they've been circulated.

PRESIDING COMMISSIONER ROHY: This is the copy that everyone should have had. It's dated May 14th of the legislative language. So I would appreciate that your comments refer to this. So I want to assure you that that is our basis point.

Today's workshop is intended to receive input and suggested language changes. We are not here to draft language by Committee; I don't think the day is long enough to do that. However, if you have suggested language we certainly would appreciate getting your suggested language as the Committee goes through its deliberations in the next few days to get a redefined legislative language proposal out.

So it is our intention to discuss the suggestions today to understand them, but not to debate them.

I believe that we have an agenda. Was that upfront also for everyone?

MR. DE ANGELIS: Yes.

PRESIDING COMMISSIONER ROHY: And our first item is going to be staff comments. But before we go there I'd like to ask Commissioner Laurie if he has some opening comments.

COMMISSIONER LAURIE: Thank you, Commissioner Rohy.

I would simply like to echo your comments. I think your comments are well stated.

Our purpose for today is clear. The issue is important; the legislation is important; your thoughts are important; and we are open to receiving your input.

I've heard reference to the existence of a document. I don't know what that document is. I have not seen it; the Committee has not seen it. As far as I'm concerned it is irrelevant to today's discussion and should be irrelevant to you as well.

With that in mind, again, I am in concurrence with Commissioner Rohy's understanding of our reason for being here today and I am very anxious to hear input.

Thank you.

PRESIDING COMMISSIONER ROHY: Thank you, Commissioner Laurie.

I'd like to start with the staff presentation of the proposed legislation, and I believe Mr. DeAngelis is going to start this.

MR. DE ANGELIS: Thank you, Commissioner Rohy, Commissioner Laurie.

First of all, I think as Commissioner Rohy said, we are working off the May 14th draft of the legislation. And by way of background, let me mention that AB 1890 specifies the CPUC transfer public interest RD&D funds to the California Energy Commission pursuant to the administration and expenditure criteria to be established by the Legislature.

The CEC was asked some time ago by legislative staff to draft these administration and expenditure criteria. And really this 05/14 copy was developed to meet this request. The plan

is for Senator Sher to include it in SB 90 along with the AB 1890 renewables enabling legislation.

By the way, there are some similarities between the Commission's proposed RD&D provisions and the Commission's proposed renewable provisions. These similarities are really in the administrative streamlining provisions which are needed for both.

Anyway, over all, the 05/14 legislative draft administrative and expenditure criteria would provide a foundation for the public interest RD&D program in really two key areas. And I think both were mentioned by Commissioner Rohy earlier.

Really first it provides overall legislative policy for this program. And for those of you who participated in the RD&D collaborative advisory group which developed the strategic level draft plan, amongst that advisory group you'll see a lot of similarity between the strategic plan from the advisory group and the legislative policy areas of this draft legislation.

Secondly, it also provides administrative streamlining. And again, for those of you who participated as stakeholders, you'll also remember that we had discussions about the administrative streamlining needs for this program, but we did not get into the details that are currently in this 05/14 draft.

Anyway, we thought a good starting off point for the workshop was for staff to walk through the 05/14 version of the RD&D legislation, provision by provision, so that we are all at a common basis as to the reason for each provision.

Kelly Birkinshaw is here by my side here, and he has become over the past couple months the in-house expert on contract streamlining at the Commission. So he is going to help me by covering those contract streamlining provisions when we get to them.

So let's start at the beginning, again, with the 05/14 version.

Page 1, Section 1 through 4 -- and I'll just walk through these verbally, section by section -- is really self explanatory. This is where the AB 1890 renewables program legislative

authority would be included.

Page 1, Section 5, Section 384 of the Public Utilities Code, this provision really accomplishes two main purposes.

Number one, it sets up the public interest RD&D fund as a trust fund which provides more security that the funds are only to be used for public interest RD&D purposes, then if only a typical state fund is created. So this is a trust fund.

Secondly, it also provides for continuous appropriations for those funds with the reasoning that funding levels already have been established for the program in AB 1890 for four years. And really, longer encumbrances and liquidation period is need for RD&D than the typical state budgeting one-year encumbrance, two-year liquidation periods.

Now that's terminology perhaps to some of you. But "encumbrance" means that is when an agency actually authorizes the spending of the dollars, such as the Energy Commission approving contracts. That's what an encumbrance is.

Liquidation is the period of time that the contractor would have to spend those funds. And typically in state budgeting is a one-encumbrance, two-year liquidation period.

And very clearly it has been our experience at the CEC that R&D projects take much longer to complete and also solicitation periods also consume a lot of time. So therefore, there is a longer encumbrance or liquidation periods that would be needed, and continuous appropriation certainly provides that.

It would also allow us to levelize workload for the programs, spread the workload over a longer period, and provide for windows of opportunity to the program throughout the year. So that is really the reasoning for Section 5, Section 384 on page 1.

Let's see, moving along, page 1, Chapter 7.1 of the Public Resources Code, from there on, this is Section 25620. I think most of you will recognized that since most of this entire

section was taken directly from the Strategic Level Plan for AB 1890 RD&D. And as most of you know, the Plan was drafted by this collaborative RD&D advisory group, so you'll see a lot of similarity in what was in that report and what is listed here in Section 25620.

For example, 25620(a) is really the mission statement, and then (b) through (h) are the objectives that were listed in that report. There have been some modifications to those by the Commission.

Moving along, that gets us up to page 3. And if we go to Section 25622, this section really has two overall purposes.

Number one, it allows the Commission to use its existing authority for RD&D programs for the AB 1890 RD&D program. It allows us to use grants, loans and contracts that exist in our existing authority. It allows us to have matched contributions for RD&D program. It allows repayments of contracts and other sorts of provisions.

The second purpose of this section is that it exempts CEC from doing regulations under the Administrative Procedures Act, APA. The reasons for this exemption is that the Commission has always operated in highly public processes of seeking advice from those interested and affected in RD&D policy and also in the decisions made on contracts.

An example, of course, if the collaborative advisory group process for drafting the Commission's Strategic Level Plan for RD&D. If the Commission is required to do draft regulations under these APA requirements for the AB 1890 RD&D program, staff estimates about an 11-month delay in the first contracts awarded to this program. This estimate is based on the last requirements established by the Commission several years ago in energy technology development which required 17 months to do regulations under the Administrative Procedures Act.

So moving along, again page 3, Section 25623. This merely states the wide range of eligibility for contracts to do the RD&D for the Commission.

Section 25624, also on page 3. This section again states a variety of contracting options that the Commissions can use, and a variety of award mechanisms which are so important for administrative flexibility in implementing and RD&D program. It allows competitive awards, single-source awards, and awards to unsolicited proposals, again, to provide for creativity in this program.

Last, it also sets requirements for meeting the AB 1890 definition of what public interest RD&D is.

Moving along, page 3, Section 25625. This section covers criteria for evaluating proposals and making awards in the program. It does it in a non-limiting way. The basis of the criteria are the narrative in the Strategic Level AB 1890 RD&D Plan first drafted by the collaborative advisory group in the seven workshops held earlier this year.

And most of you will recall that in that Plan and in the Plan that was adopted by the Commission last Wednesday, it lists criteria in a number of overall areas, but the narrative, if you look at the narrative it is really very similar to this listing here of criteria.

So moving along this now takes us to page 4, Section 25627. I'm sorry, that would be page 5 -- page 6, 25627. Oh, I'm sorry. It's page 4, 2562-, the "7" is missing there. That's part of the reason for the confusion. It's the bottom of page 4, and that's a typo the "7" missing there. And also page 25628, these are the contract streamlining provisions which Kelly Birkinshaw will briefly review right now.

MR. BIRKINSHAW: Good afternoon, Commissioner Rohy, Commissioner Laurie.

I'm going to build on what Mike DeAngelis has already started with these provisions. I'd like to go through the two or three contract streamlining provisions, introduce that provision and then give a brief rationale for it. I know time is very limited, so I'm going to be very

brief in my comments.

The first provision really is Section 25626 dealing with intellectual property rights. This provision basically provides some legislative guidance and directs the Commission to develop sharing arrangements for intellectual property rights considering the amount of funds, the type of the intellectual property, as well as the specialized expertise.

The Commission has fairly broad authority in being able to assign all or part of these rights as a result from an award when it's in the state's best interest.

Probably the primary provision dealing with contract streamlining is Section 25627 in which the Commission has some authority for some alternative solicitation methods. These include sealed competitive bid; a competitive negotiation process; enhanced authority for single and sole-source contracting; and finally, the ability to enter into multi-party agreements.

In general, the State Contracts Code was developed to facilitate state agencies in procurements in which the specifications are easily developed for the product or the service being contracted for by the agency. As a result, a sealed competitive bid is the preferred method with the selection based upon the low cost.

With our R&D program being so broad in that we can provide funding for projects ranging from end-use R&D through environmental projects to advanced generation really unable to provide specifications in advance of the project. And as a result, we are suggesting some alternative solicitation methods, the first being --

COMMISSIONER LAURIE: Question, if I may, Commissioner Rohy.

Under sub (a), the sealed bid, is that written in such a fashion as so that it is limiting the time and circumstance under which you can use a sealed bid method? Is it intended that the word "only" appear in there? A sealed bid method may be used only?

So the purpose of the question is: Is this section intended to limit and define

specifically those unique circumstances when you can use sealed bid?

MR. BIRKINSHAW: The Contracts Code has different methods depending on the type of contracting envisioned. In our R&D we generally use consultant services contracts in which a sealed competitive bid is the method specified by the Public Contracts Code.

This is intended to provide authority to use this method, where a solicitation envisioned by the Commission lends itself to that type of method.

MR. DE ANGELIS: So I think it was written more to allow flexibility of choice of options rather than to require certain options and certain conditions.

MR. BIRKINSHAW: Exactly.

The first alternative process is a competitive negotiation. This provision provides criteria under which the Commission could use this method.

Under current requirements, bidders are really only allowed to provide information to us through a proposal document with interaction severely limited between staff and the bidder. And where they are allowed, the discussions have to be formally noticed and offered to all bidders regardless of the needs of the agency.

We believe this is a fairly burdensome requirement and often because of the difficulties involved it results in selection decisions that are based on less than complete information. And we've seen where this lack of interaction has resulted in bidders spending a great deal of time and money developing a proposal only to be rejected because of a minor administrative problem.

We think it's very important that for most R&D projects this interaction be allowed to provide an opportunity for the bidder and the staff to discuss detailed technical and policy issues or questions regarding their proposal, as well as to respond to questions that may arise on administrative requirements related to the program.

Finally, I think it's important that staff have the ability to negotiate the price or the rates in order to obtain the best value for the state in these types of projects.

A second method detailed in this section is enhanced authority for sole-source and single-source contracting. And again, the section provides criteria under which this could be used. There are really a couple of areas where this becomes important. RD&D is a very innovative and creative endeavor, and the state really needs opportunities or needs to be able to respond when opportunities present themselves.

We expect to have many proposals that would come in outside of a normal or planned solicitation. This is particularly true of projects that result from the development of R&D consortia; and without some broadened authority, we risked being able to participate in the project, and there is the chance, of course, that that project would not go forward.

COMMISSIONER LAURIE: In regards to sub (b), the Commission may use a competitive negotiation process where if you do not have a factual circumstance where 136 exists, is the intent of this language that you may then not use the competitive bidding process?

MR. BIRKINSHAW: That's correct. It would an "or" though.

COMMISSIONER LAURIE: Right.

MR. BIRKINSHAW: Yes.

COMMISSIONER LAURIE: And so I go back to my earlier question: Since this limits your factual circumstances under which you can use the competitive negotiation process, do you need the word "only" in the lead-in sentence? "The Commission may only use --." Or in your view is the intent clear even though you do not have the word "only" in it.

MR. BIRKINSHAW: Well certainly putting the word "only" would provide additional clarity in this.

COMMISSIONER LAURIE: And is it your understanding that that is intent?

MR. BIRKINSHAW: My understanding, the intent is that we would only use this method if one of the six criteria are satisfied under (b).

MR. DE ANGELIS: Well with the current language you could potentially -- the Commission could potentially use competitive negotiations under other circumstances also though. And so if you added "only" then it would mean "only."

COMMISSIONER LAURIE: That's right, and that's why I'm trying to discern what the intent is.

MR. BIRKINSHAW: Well, I think that, my perspective anyway, where we have additional flexibility that provides us the opportunity at least to consider alternatives to this, my understanding though is that this was envisioned as being limiting. That it --

COMMISSIONER LAURIE: If it were not limiting, if the intent was not to limit, then there wouldn't be any point in putting any language in whatsoever.

MR. BIRKINSHAW: That's correct.

COMMISSIONER LAURIE: Maximum flexibility would say you can use all these methods; however, you may only use competitive negotiation process under these circumstances.

I don't have any problem if that in fact is the intent and has been the intent of the authors of the language as originally drafted.

MR. BIRKINSHAW: Well that was certainly the intent as I understand it, yes. Okay. Let's see, I just finished a brief discussion about sole-source and single-source contracting, and probably your comment would be appropriate there as well. Again, this provides the criteria under which sole- and single-source contracting could be used by the Commission.

The last major provision of that section simply provides the ability for the

Commission to enter into multi-party agreements. This has been an issue in the past, again in contracting through R&D consortia. In fact, I think we've been unsuccessful in negotiating a multi-party agreement. And where we have been able to do it, one of the members has had to enter into a side agreement with the Commission and often times forced to accept greater liability in one of these side agreements.

The last provision dealing with contract streamlining is Section 25628 having to do with indemnification. This provision again is important in the context of R&D consortia. Indemnification has to do with shared liability resulting from a lawsuit in a contract.

Typically, the state requires indemnification from a contractor but is unable to reciprocate in a mutual indemnification. This provision would provide the Commission with authority to purchase insurance in consultation with the Department of General Services to cover this indemnification obligation, and again, to facilitate our involvement in R&D consortia.

MR. TANTON: Kelly, is that limited to multi-party agreement and consortia, or --?

MR. BIRKINSHAW: The way it is drafted now, yes it is limited to multi-party agreements.

MR. TANTON: So in bilateral agreements there is no need for that provision?

MR. BIRKINSHAW: I personally believe there is a need, particularly where we might get involved with the Department of Energy. But the way it is currently drafted, it is limited to multi-party agreements.

COMMISSIONER LAURIE: Question on 25628. You make reference to the indemnification obligation. Currently, the Commission has the authority to require an indemnification provision in its contractors. You have indicated that currently the Commission does not have legal authority to indemnify.

MR. BIRKINSHAW: That's correct.

COMMISSIONER LAURIE: Under this legislation is there any legal obligation for the Commission to offer mutual indemnification?

MR. BIRKINSHAW: Absolutely not. In fact, as I understand it that is something we legally cannot do. This would just simply provide authority to purchase insurance.

COMMISSIONER LAURIE: Thank you.

MR. DE ANGELIS: Okay, moving along then to conclude the summary. Page 6, Section 25629 is I think where we did leave off. This section allows the provisions of this legislation, particularly for administrative streamlining, to be applied to other CEC RD&D programs.

For example, the Commission's Transportation RD&D program also has similar contracting and other constraints which can be addressed by the variety of contracting tools provided in this draft legislation, and this section allows that to happen.

Page 6, Section 25630. This allows the Commission the flexibility to contract for administrative and technical support for this program. The CEC, as does most state agencies, has some significant hiring constraints. And while we have substantial expertise on staff now, we can't possibly cover the hundreds of technologies, potential and proposals potentially eligible or the many tasks which need to be done as part of a major RD&D program which AB 1890 has provided for us.

So this will also allow for peak load support to staff when we do get into peak load periods, and that's why this provision is included in there. This, of course, would be budgeted in the annual budget cycle.

Page 6, Section 25631. This section recognized the Legislature's interest in this RD&D program and it really requires the Commission to report annually to the Legislature on the

program. Specifically, to report on the awards made and some basic information about each award, and also if there are any recommendations from the Commission on improvements to the program. We would report that here. It also requires that the Commission consult with other interested parties in the preparation of the report.

Lastly, Section 7 provides of this legislation as an urgency statute so that these provisions take effect immediately and can be used this year.

For example, for program solicitations which you may want to begin this year so that the program is off and running when the funds become available in early 1998. Otherwise, if it is not an urgency statute it would have to wait for 1998 for these provisions to be effective.

So that really concludes the provision-by-provision overview from staff.

COMMISSIONER LAURIE: Now Mr. DeAngelis, could you turn to page 3, Section 25625, sub (a).

MR. DE ANGELIS: Yes.

COMMISSIONER LAURIE: If you were an applicant and you desired to argue that your proposal is consistent with the energy policies of California, and I have heard some discussion about how practically speaking this is something difficult to accomplish, do you have any thought about how you as an applicant would go about making that argument on a single sheet of paper?

MR. DE ANGELIS: On one sheet? Well, one sheet may be a bit constraining, but if I were an applicant I would certainly look at a couple of documents.

No. 1, I would look at the last Biennial Report of the Commission, Governor's Policy Report. I would look at that. I would certainly look at the legislative requirements for the program. Both AB 1890 I would review; assuming SB 90 does pass, I would review that and include that and references to that.

And finally, I would probably refer to the Commission's adopted Strategic Level Plan for AB 1890 RD&D program.

COMMISSIONER LAURIE: Now in the consideration and adoption of that Strategic Plan most or all of these other documents that you're making reference to were considered as part of the development of that Plan. That's a question.

MR. DE ANGELIS: That's correct. That's entirely correct, but they did not go back and quote all of those documents.

COMMISSIONER LAURIE: But the Strategic Plan to you would be a very good starting point?

MR. DE ANGELIS: Very definitely.

COMMISSIONER LAURIE: Thank you.

PRESIDING COMMISSIONER ROHY: Thank you for your overview there.

I see that the next item on the agenda is comments from the workshop participants or what I would say "public members" here today whether you participated in a workshop or not. We do want to hear your input on all these items, and we are recording this workshop so that we will have a record of your comments and we'll be able to consider them as we put together our final language.

I'd like to make one brief other comment here. It's important to get the language in place soon. We hear various dates of when the Conference Committee will meet, but it is probably sooner rather than later. Initially we thought we might have four to six weeks from now before they meet. Current input says it might be shorter. I don't know if anyone has more definite numbers than that.

Once we have this language into the Conference Committee, we will start working

more actively. And I say “more actively” because staff and Committee have been working on starting the Implementation Plan. Many of you have said that is critical. We are working on it. We will be coming to you and soliciting input as we have something to solicit input on as we go forward.

So we have not lost sight of January 1. The Implementation Plan is critical. But this is very important today to hear your input on the legislative language.

Having said that, I’d like to start with the blue cards I have before me.

And I believe it is a Mr. Lombard from Waste Energy Integrated Systems. Please come forward.

MR. LOMBARD: My name is Charles Lombard, Waste Energy Integrated Systems.

My particular comment is with regard to Section 25623 where you note in quite large detail most of the state chartered organizations that are eligible recipients, and I would note that you left out limited liability companies which are becoming increasingly popular and which Waste Energy Integrated Systems is one of.

A generally comment I think I would like to make is that the document obliquely refers to the atmospheric carbon containment problem, but doesn’t directly anywhere. And I think it might be helpful to identify that because it is impacted by a number of the end use energy efficiency renewables and related renewable energy RD&D topics.

Thank you.

PRESIDING COMMISSIONER ROHY: Thank you for your comments.

Al Pak from EPRI.

I hate to put Al on early in the session, but on the other hand, everyone else, then you have a target.

[Laughter]

MR. PAK: Thank you, Commissioner.

For the record, my name is Al Pak from EPRI. I'm the official target, I guess, today.

As a supporter and participant in the development of the Commissions Strategic Plan for the RD&D program, we understand the purpose for this legislation. We generally agree with all of the provisions and their particulars. And if called upon today to testify before the Legislature, we would support this legislation as written.

However, there are a couple of provisions and suggestions we would make that at least from EPRI's self interest and perspective could improve this legislation, and so I just suggest those to you now.

First of all, on the first page with respect to Section 384 of the Public Utilities Code, the California Public Utilities Commission, your sister agency, recently adopted a procedure for the Energy Efficiency Program where the funds collected pursuant to Article VII are going to be held in trust by the three investor owned utilities, and under the direction of the CPUC.

We would suggest that an alternative to creating the trust fund administered by the CEC, you could simply have those funds invested in trust by the utilities themselves and direct disbursements to be made from the utilities. There doesn't have to be an actual physical or paper transfer of the funds to this Commission so long as they are under your authority and jurisdiction. So we would recommend that that is an alternative way to get past the continuous appropriation issue that was raised by Mr. DeAngelis.

Our second comments have to do with the provisions on page 2 related to Section 25620 subsections (e), (f) and (g). EPRI's attorneys were recently apprised of a provision in the Public Contracts Act of the state that provides the ability for private third parties to sue an agency

and its contractor for failure to observe the contracting agencies' rules in the letting of that contract.

In the event that that third party is successful in alleging that the agency either ignored statutory guidelines or its own internal practice, the contractor can be liable for disgorging all of the funds dispersed to it, notwithstanding that those funds have been spent either in direct costs or in subcontracts.

So when we looked at these three subsections (e), (f) and (g), because they are directory and because of the potential liability a contractor might face in the event that the Energy Commission decided not to strictly apply or there could be some allegation that the Commission did not strictly apply some of these provisions, we would prefer to have these remain in the Strategic Plan as guiding principles rather than statutory directives.

Our third set of comments have to do with the provisions of Section 25626 on page 4. In order to give the Commission greater flexibility with respect to intellectual property, and we at EPRI have found the flexibility when dealing with possessors of or developers of intellectual property, flexibility is a good thing. We would recommend that in the last sentence of the first paragraph that the word "shall" either be preceded by the words "within its discretion" or changed to "should" so that it would read, "either the Commission within its discretion shall implement this legislative intent," or "the Commission should implement this legislative intent."

We don't know that this constitutes the full range of options that you want to make available to yourselves, but we have a feeling that your contractors and developers will provide you with some additional options.

And then again in the second paragraph, first sentence, "The Commission may negotiation intellectual property" would be our recommendation rather than "shall."

MR. TANTON: Excuse me. Al. Would "may" work in the first instance as well? I just want to make sure I understand it.

MR. PAK: Yes, it does get to the same point, but it's just read awkwardly when we read it as "the Commission may implement this legislation" because --

MR. TANTON: Okay.

MR. PAK: -- then it doesn't really mean much.

MR. TANTON: All right. But your desire is to have it be discretionary at the Commission?

MR. PAK: Yes.

MR. TANTON: Okay.

MR. PAK: So those would be our comments with respect to the proposed legislation.

I'd be happy to answer any questions you might have.

PRESIDING COMMISSIONER ROHY: Questions?

COMMISSIONER LAURIE: Yes, sir. Question perhaps of staff.

Recognizing the potential outcome of a successful attack on the rewarding of a contract, is it thought appropriate to include language that may make reference to the Commission's broad discretion in awarding contracts so that when a court looks at the discretionary authority of the Commission they look at the term "broad discretion." I would certainly be interested in General Counsel's thoughts on that issue.

What we need to do to ensure that a lawsuit is not successful simply because a judge may find that some of the criteria may not have been met even though we understand that it's intended to be more of a guideline than anything else.

Your thoughts?

MR. DE ANGELIS: Well, Commissioner Laurie, you have me at a disadvantage since you are an attorney and I am not. So I think those questions --

COMMISSIONER LAURIE: That's right, and just remember that, Mr. DeAngelis.

[Laughter]

MR. DE ANGELIS: -- are appropriately addressed to our General Counsel.

PRESIDING COMMISSIONER ROHY: Remember we are not here to debate the language now that we have two attorneys here besides Mr. Pak.

MR. ABELSON: Commissioner, the first I heard of the particular concern that EPRI raised was today at the hearing. And what I think would be constructive for everyone would be for Al to share with us the specific background of that and then we could advise the Commission further as they look at whether or not there is a need for an amendment in this area.

COMMISSIONER LAURIE: Thank you, David.

MR. PAK: We can do that, but I think, Commissioner, you hit our concern right on the head when you've got prescriptive rules in a statute and a failure to observe any one of them is what creates the liability. And according to my attorneys -- I'm not here in a legal capacity. I have not reviewed the Public Contracts Act. But according to their review this would lay us open to some downstream legal liability.

PRESIDING COMMISSIONER ROHY: Thank you for your thoughtful comments.

MR. PAK: Thank you.

MR. TANTON: Excuse me, I have one quick question.

Al, for some prescriptive things elsewhere in this legislation your solution to (e), (f) and (g) was to retain them as guidelines in the Strategic Level Plan?

MR. PAK: Yes. The other prescriptive provisions we either thought were so essential to the program or related to the merit selection of the bidders that we didn't think it would

be appropriate to change those to discretionary as opposed to directive. That is, after all, the essence of the program.

MR. TANTON: If you could in the next couple of days send us a citation for the particular Public Contracts Code that caused your concern.

MR. PAK: Yes, I will.

PRESIDING COMMISSIONER ROHY: To the docket, please.

MR. TANTON: Thank you.

MR. PAK: Thank you.

PRESIDING COMMISSIONER ROHY: Mr. Chamberlain, did you have comments on this particular item?

MR. CHAMBERLAIN: The only thing I was going to add was just a note for the record that the Warren-Alquist Act provides for a 30-day statute of limitations for anyone who wants to seek judicial review of a Commission decision, which I believe would include a decision to make an award under this. So at least we don't look at the specter of this litigation occurring some years down the road after millions of dollars have been spent. And I mean, there may be a need for additional legislation as well to resolve this issue. But I just wanted you to be aware of that.

PRESIDING COMMISSIONER ROHY: Thank you for that input.

COMMISSIONER LAURIE: And would you be satisfied, Mr. Chamberlain, that the 30-day statute would be applicable to the implementation of these provisions?

MR. CHAMBERLAIN: Yes.

PRESIDING COMMISSIONER ROHY: I have a card from Jane Turnbull with a "possibly" on it. Do you wish to say something, Ms. Turnbull?

MS. TURNBULL: No.

PRESIDING COMMISSIONER ROHY: Pass. I'll reserve it in case you wish to speak later.

I have a difficulty reading here, so please excuse me if I say your name wrong.
Bob Mucica.

MR. MUCICA: Good afternoon. You are not alone in difficulty in pronouncing my last name.

Let me introduce myself. I'm Bob Mucica. I'm an employee of the Rocketdyne Division of Boeing, located in Canoga Park, California.

And I came this afternoon just to make a few very terse comments pertaining to the issue of streamlining, starting out by saying that we currently are a major player in the renewable energy program activities. We produce and manufacture the central receivers for projects like the Solar II project down in Daggett, California. And we are actively engaged in RD&D efforts both with the federal government and their various laboratories.

I really would like to encourage an activity similar to that which we've used with NREL up in Golden, Colorado. They called theirs a fast track procurement. And the bottom line is that we are able to get on board; to do a proposal; to have the proposal evaluated in an extremely short period of time; and to subsequently, not only ourself but others, to obtain awards in a period as short as two weeks. That considered some very detailed negotiation.

I mention this because there is a model in place which someone, if they would choose, could review and see if there are some elements of it that may be applicable to here. I think the bottom line in all of that is that it saves industry a tremendous amount of money to curtail all of the paper and the negotiation process and hopefully it would save the Commission an equal amount of money. That proved out to be the case in these prior fast track procurements that we participated in.

PRESIDING COMMISSIONER ROHY: And NREL has the model, you said?

MR. MUCICA: Yes, they do. A contact there would be a gentleman by the name of Tom Williams. He's in the program office up there, and their procurement people are also, as you would suspect, quite well versed in that.

PRESIDING COMMISSIONER ROHY: Thank you for your comments. We share the common vision of two weeks would be great.

MR. MUCICA: Yes, I agree.

MR. TANTON: Excuse me, Mr. Mucica. For the sake of the record, if you have a business card would you leave it with the recorder, please?

MR. MUCICA: Yes.

PRESIDING COMMISSIONER ROHY: And keying off his comments, we do want to integrate our legislation with that that is being proposed for the renewable program so that they don't look like one came from Mars and one came from Venus with no reference to the book.

Our next person to comment is Steven Vosen from Sandia National Labs. I probably blew it again.

MR. VOSEN: You got it right that time.

PRESIDING COMMISSIONER ROHY: Okay.

MR. VOSEN: Thank you. My name is Steve Vosen; I'm from Sandia Labs; and I have a few comments.

The first two pertain to language that may affect the ability to contract with the national labs. The first one is Section 25623. Actually the role of the national labs isn't explicitly called out in here. I assume that you intend to include that. And I'd suggest adding the words

after it says “federal agencies, research, development and demonstration institutions” add “including federally funded research and development centers” since we’re not a federal institution.

MR. TANTON: Steve, would that be all inclusive of what work is undertaken at the laboratories? When you say “centers” to some extent I think that conveys one perhaps not all inclusive institution.

MR. VOSEN: I think it would include all of the national labs and any government funded research establishment.

MR. TANTON: Okay.

PRESIDING COMMISSIONER ROHY: And your words were “including federally funded R&D centers”?

MR. VOSEN: Yes.

PRESIDING COMMISSIONER ROHY: Thank you.

MR. VOSEN: I’ve submitted a written copy.

PRESIDING COMMISSIONER ROHY: Thank you.

MR. VOSEN: The second comment regards indemnification. And I’m not a lawyer and I don’t want to get into this, but our attorney discussed it with me and he said that like all government agencies we cannot provide indemnification. And so maybe Kelly can discuss this with our attorney and see if they are in agreement with our view on this.

MR. BIRKINSHAW: Certainly if you have a contact for me and would like to get in touch with them, myself and our contract attorneys and have a discussion about that.

MR. VOSEN: Okay.

MR. DE ANGELIS: I think that was one of the reasons for the insurance provision. That’s why we had that in there. But I think there is an earlier comment that perhaps that could be expanded to apply to more than R&D consortia.

MR. VOSEN: Okay. And then I have three more suggestions that we feel may help to accelerate the RD&D process.

The first one is in Section 25620(d) on the creation of an RD&D knowledge base. My reading of that, the language in there suggests that the goal of the knowledge base is to make the public aware of the results of the RD&D that the Commission sponsors. At least that is the way that I read it.

I suggested this activity also be expanded to include areas of expertise at businesses, labs and universities to facilitate the formation of alliances to respond to RFPs.

So for example, if someone in a business is in a certain area and they don't know where, you know, they may need some particular piece of information to respond to the RFP. There maybe someone at the university that they don't know about, and perhaps the Commission could have some sort of database. Or somebody from a national lab who doesn't know what businesses exist in that area, you know, maybe they could come to the CEC and they could kind of help facilitate that process.

PRESIDING COMMISSIONER ROHY: I agree with you in principle; we'll have to work on the language of how we put it in.

MR. VOSEN: And then the last two comments come from our tech transfer people, and this is their feelings on some of the intellectual property issues and things that have slowed down, putting together deals with the national labs.

Section 25626 discusses sharing and assigning intellectual property. We suggest that the Commission includes language to enable parties responding to the RFPs to specify their expectations regarding intellectual property and that it be negotiated. Instead of stating what it is upfront, allow that negotiation to occur.

And then lastly, Section 25631 discusses reporting to the Legislature. We suggest

there be some protection of company confidential information.

We have that problem sometimes if we deal with companies since we're a -- you know, there's the Freedom of Information Act, people are concerned about letting company confidential information out. We always are dealing with that and we just want to make -- I think it would facilitate things if companies weren't concerned about the results being reported out to the general public.

PRESIDING COMMISSIONER ROHY: Just a quick response to that one. We are very sensitive to that issue and we have started an rulemaking on information here at the Commission and may, at the next Business Meeting, expand that rulemaking on information. But that would include the confidentiality issue. So we are quite active in that area right now.

MR. TANTON: Steve, I assume your concern regarding confidentiality is not just with respect to any report we may forward to the Legislature?

MR. VOSEN: Right.

MR. TANTON: The section you referred to is, you know, when we tell them what we've been up to.

MR. VOSEN: Well we weren't sure exactly what all would be entailed in that reporting.

MR. TANTON: Your concern is with confidentiality of business sensitive information.

MR. VOSEN: Right.

MR. TANTON: Not that we might be telling any one particular entity about it.

MR. VOSEN: Right.

MR. TANTON: Okay. So it might be a whole new section. Okay.

PRESIDING COMMISSIONER ROHY: Comments?

COMMISSIONER LAURIE: Question, Commissioner Rohy.

Question of Mr. Abelson. Section 25623, those kinds of provisions always cause trouble because one the one hand somebody mentioned LLCs, now we have national labs. Is there a concern that the more you list the greater danger there is that if you're not included there is a problem because you'll always forget somebody?

So I would ask, is it desirable in order to avoid challenge to list everything possible even though you will always miss something, or not list anything at all giving you ultimate flexibility? How do you draw that line and what's the best way to draft legislation?

MR. DE ANGELIS: You're asking staff that question?

PRESIDING COMMISSIONER ROHY: We have Mr. Abelson, an attorney, coming forward.

MR. DE ANGELIS: Okay.

MR. ABELSON: I think, Commissioner, the thinking behind this initially was in trying to echo back to the advisory group the very broad inclusiveness that they expected from the program. And I think that one can handle it in a couple ways.

You can try to be exhaustive as you said, and that's always risky because you don't know if you've captured the latest statutory enactment regarding limited liability partnerships or not. Or, you can say that the program is open to recipients without limitation as to type of institution, assuming that's your intent.

If those are your two choices, I would think it would be wiser for us to take the latter choice. But of course, then parties don't see their specific institution has been included and they may feel that they are at some risk.

COMMISSIONER LAURIE: Could you handle that through some sort of preamble as opposed to specific statutory language?

MR. ABELSON: You're talking about the idea of a policy statement by the Legislature of intent to not in any way limit the eligibility?

COMMISSIONER LAURIE: Yes. I just hate to see the idea of some lawyer avoid the language but not limit it to and argue over it if there's any way to feasibly get around it.

MR. ABELSON: As I say, I don't think staff had any specific reason for the litany that's articulated here other than to reflect back broad inclusiveness. And I think the legal point that you're raising is a good one and we can certainly look at an appropriate prefatory language that would allow that.

PRESIDING COMMISSIONER ROHY: Especially since we've had two comments on this today already.

MR. ABELSON: Sure.

PRESIDING COMMISSIONER ROHY: Other questions?

Thank you, Mr. Vosen.

MR. VOSEN: Thank you.

PRESIDING COMMISSIONER ROHY: Mr. Todd O'Connor of Southern California Edison.

MR. O'CONNOR: Good afternoon.

PRESIDING COMMISSIONER ROHY: Good afternoon.

MR. O'CONNOR: For the record, my name is Todd O'Connor; I'm Manager of Collaborative Funding Development in Southern California Edison's Research and Technologies Application Department.

Southern California Edison appreciates the opportunity to discuss and offer comments on proposed legislation implementing the Strategic Plan Report on implementing the RD&D provisions of AB 1890, and to recommend actions for your consideration to successfully

implement public interest RD&D.

Very briefly, our comments cover four general areas. One is to suggest changing the title on proposed Chapter 7.1 from Public Interest Electricity Research, Demonstration and Development to Public Interest Energy RD&D. Those changes make is consistent with the criteria set out later on under the legislation.

Edison's comments also emphasize that the legislation should in part reflect the CEC action last month to include system reliability maintenance enhancement as a key Strategic Plan objective with relating funding criteria.

And the language I'm representing is the amendment approved by the Commission, and it reads as follows under Objective 1, and includes in part:

"This portfolio shall also provide strategic energy research, including systems related research projects which cut across focus areas such as research to improve electricity system reliability."

And we would then add the following language: "to improve public interest electricity system reliability, not provided by the PUC."

Within the context of that language, Edison recommends that the following funding and administrative projectives for system reliability RD&D be incorporated into the proposed legislation:

One, a multi-year approach to provide the most efficient and effective way to conduct system reliability RD&D, given the anticipated demand on T&D systems due to restructuring.

Two, system reliability RD&D programs should preserve the value of existing collaborative partnerships currently involved in conducting various programs and projects throughout the state.

System reliability RD&D funds should be administered through a pre-allocation mechanism which would be the most cost effective and efficient way for the CEC to supervise this area. This approach would optimize proven experience to conduct system reliability RD&D programs and projects, especially with the demonstrated ability to collaboratively leverage those funds.

Four, system reliability RD&D would be subject to appropriate accountability and review.

System reliability and public RD&D funding criteria. To meet these objectives, Edison recommends that the CEC adopt and incorporate the following criteria into its public interest RD&D administrative and funding criteria recommendations that will be considered for legislative consideration.

Quote, “California has a vital interest under restructuring not only to ensure a reliable power supply into California, but also to enhance the reliability and integrity of the statewide T&D system to accomplish that objective. Therefore, system reliability RD&D programs serve the public interest by:

“One, enhancing T&D system efficiency and reliability.

“Two, managing load capacity of transmission distribution systems.

“And three, increasing power grid efficiencies.”

There are two other areas we want to just briefly mention is that where it’s possible and where appropriate, we suggest that the CEC fund these projects on a program-by-program basis rather than a project-by-project basis as a way to ensure the efficient value of the funds involved.

And two, where appropriate we suggest that the plan utilizing multi-year options subject to appropriate accountability and review.

Edison looks forward to working with the Commission staff to implement the plan, and I'm available for any questions.

PRESIDING COMMISSIONER ROHY: Thank you, Todd. You have submitted these to us in written form.

MR. O'CONNOR: We have.

PRESIDING COMMISSIONER ROHY: I presume they will be put into the docket or have been.

MR. O'CONNOR: Yes, they have. Thank you.

PRESIDING COMMISSIONER ROHY: Commissioner?

Thank you for your comments.

Dr. Donald Aitken, Union of Concerned Scientists is next.

DR. AITKEN: Commissioners, for the record I am Donald Aitken; I'm Senior Staff Scientist with the Energy Program of the Union of Concerned Scientists.

I'm going to be addressing very briefly your Section 25620, pages 1 and 2. I apologize for not participating in the previous workshop. I had a prior speaking engagement and I couldn't in good conscience cancel it for the workshop. And I did submit my opinions on the reliability issue in writing too.

PRESIDING COMMISSIONER ROHY: And I did receive those and read them.

DR. AITKEN: Pardon?

PRESIDING COMMISSIONER ROHY: I did receive those and I did read them.

DR. AITKEN: Good, thank you.

And I respect that that issue now has been discussed and that it is not appropriate

here to challenge that but rather to discuss particular language which I should like to do.

PRESIDING COMMISSIONER ROHY: The intent is to get the program started.

DR. AITKEN: Yes. Well, I couldn't agree more.

PRESIDING COMMISSIONER ROHY: Thank you.

DR. AITKEN: The basic core of what this has all been about has clearly made it through all stages from PUC to Legislature to here, and you have that in your very first paragraph of 25620 that you're going to conduct and coordinate public interest energy research that will advance science and technology not adequately provided by competitive and regulated markets.

And that's really where the whole reliability debate was and was just brought before you again by Southern California Edison. It has become an interpretational matter, and so I would like to suggest some language that may help clarify the boundaries of the interpretation so this can't go on being a grey area.

Basic reliability of service is promised when a person writes a contract to a customer and offers reliable service. That's clearly something that everybody is going to expect, and that kind of thing is clearly going to be in the regulated domain whether it's generation or T&D or whatever.

And similarly for safety and similarly for reliability where you've got an extra market niche. Semiconductor companies that really need to have the assurance of very high levels of voltage control and reliability and so on. These are all market related.

So I think we can safely assume that none of the things I've just suggested would come under the preview of the RD&D program here.

I will expect to prevent erosion of the RD&D funds by misinterpretation of this, perhaps to have language that I'm going to offer that could help. I am comforted by the example

that you give of RD&D in distributed utility systems that may also enhance the reliability, because the focus really is on the distributed utility systems in that.

But I am not comforted really enough, and so I would like, if we turn to page 2, to simply suggest two items of additional wording that might give me reliability, especially in context of what we just heard from Mr. O'Connor.

On the top of page 2 under item (c) you have numbers one through four, and I would suggest a number five. My writing is as difficult as it was for you to read my blue card.

No. 5 would be something like "Projects should not duplicate or overlap research that is clearly aimed at fulfilling obligation to customers for safety and reliability of basic service, nor that is aimed at strengthening a preferred market position."

That may be a bit redundant, but it's really not because it clearly sets out a boundary.

And then if you go to the bottom of the same page under item (g) where you have subsections (1) and (2), I would suggest a number (3), a new number (3) immediately following the existing number (2) and in parallel to that. That would read something like "Using project evaluation criteria in this chapter to select projects that are clearly within the definitional boundaries of not adequately provided by competitive and regulated markets."

And the reason for doing that is to assure a vigorous oversight activity by the CEC. That those activities that come in will be screened very, very carefully across that boundary to make sure that they lie within these RD&D public interest boundaries. They are not just attempts to take what had previously been regulated R&D and to put it in here. And I thought the best way to put that oversight in was to simply establish the criteria by which you will really be screening your applicants for funding under this.

PRESIDING COMMISSIONER ROHY: Mr. Aitken, could you submit that

to the docket in written form, please?

DR. AITKEN: Yes, I'd be pleased to.

PRESIDING COMMISSIONER ROHY: I did not follow that as you were reading it. I was listening rather than trying to write.

DR. AITKEN: That's just fine. I'd be pleased to. How long does one have to submit this in written form?

PRESIDING COMMISSIONER ROHY: Time is short.

Mr. DeAngelis, would do you --?

MR. DE ANGELIS: Well, I think I would suggest potentially this week if we could.

DR. AITKEN: That's no problem. No problem. I can't do it today because I just wrote it.

PRESIDING COMMISSIONER ROHY: Great. And I would also comment to your comments that we have an operational plan coming up. We will revisit a lot of these items as we go through and how we do the solicitations, and much of what you said also will be involved in the solicitations.

DR. AITKEN: Great. I just feel more comforted if it could also be right upfront in the legislation in some way. And I will submit that tomorrow.

PRESIDING COMMISSIONER ROHY: I think Mr. Tanton --, Commissioner, do you have a question?

COMMISSIONER LAURIE: [Commissioner Laurie shakes his head in the negative.]

MR. TANTON: I have a quick one, Mr. Aitken.

Your suggested language changes suggest that the determination of adequately

provided for by the market or regulated entities is a judgement or discretionary call of the Commission. Is that in fact part of your assumption or your working hypothesis?

DR. AITKEN: It is now. I mean, I would wish it might have been a little bit clearer last week when I didn't have to lay quite so much judgement on the Commission. But I think at this point you're going to find there is a lot of greyness in here and there's a lot of judgement that's going to be called for. It can be informed judgement. I mean you're going to be dealing with the staff of the PUC for interpretation, for example.

MR. TANTON: I'm just curious as a follow-on to that response if it's your opinion that 620(a) where it defines public interest R&D should include some language clarifying that that finding of adequately provided for by the market is in fact the discretion of the Commission or the judgement of the Commission.

DR. AITKEN: Well you are talking to a physicist, not a lawyer, and I've been hearing this little banter going around.

MR. TANTON: Which is exactly why I'm asking you rather than one of the lawyers that have been up here previously.

DR. AITKEN: A physicist tends to want assurance of things really written down clearly and in clear English as to the responsibilities of people and getting the funds to where they should go. And I don't know whether I can go farther on this.

I think the responsibility without a doubt is going to lie with the CEC and you're going to be making, no matter how much you refine your language, you are going to be making judgement after judgement after judgement on this.

MR. TANTON: Thank you.

PRESIDING COMMISSIONER ROHY: With the public's help.

DR. AITKEN: Oh, absolutely. And I and others certainly will be delighted to

stay with you throughout this whole process.

PRESIDING COMMISSIONER ROHY: Thank you. We expect it.

DR. AITKEN: Thanks.

PRESIDING COMMISSIONER ROHY: Carl Blumstein, UC Energy Institute. Is that your hat today?

MR. BLUMSTEIN: Yes, Office of the President. I'm Carl Blumstein, University of California.

Most of these comments are refinements in the legislation. I want to at the end pick up a little bit on what Todd had to say and maybe we'll have a little dialog on that issue.

The first point of interest for UC is Section 25626, and we have basically two suggestions of how to increase the flexibility of the proposed policy. We think that flexibility is what you want here.

And one that is to allow the Commission to trade rights to intellectual property for other benefits so that you're not -- we are clear that benefits should accrue to the state, but the policy should be sufficiently flexible so that rights, such as copyrights, can be traded for other benefits.

And second, and this is the crucial one, that the Commission should have the discretion to base its intellectual property policy on the best way to commercialize results of its research. That's really the objective in this game. It's not royalties; it's getting that stuff out so the people benefit from it. So we've got some language which we will docket for you which try to accomplish that.

PRESIDING COMMISSIONER ROHY: That would be very helpful, thank you.

MR. TANTON: Is that the language that Mr. Modisette has sent in previously

on behalf of the University, or is that --

MR. BLUMSTEIN: Somewhat modified.

MR. TANTON: Okay.

MR. BLUMSTEIN: But essentially --

MR. TANTON: I don't want to get on the wrong page.

MR. BLUMSTEIN: -- the same. Essentially the same --

MR. TANTON: Great. Thank you.

MR. BLUMSTEIN: -- with minor modifications.

The next point has to do with 25620(c). And 25620(c) addresses primarily portfolio selection criteria. And we think that (c)(2) and (c)(4) actually are project selection criteria and belong more appropriately in 25625. And we note that 25625(g) already addresses 25620(c)(2), and 25625(h) already addresses 25620(4). And we'd like the language in both cases, the 25625 language better in any case, particularly as it applies to 25620(2) -- let me be more specific here and talk about the language and not just the numbers.

And 25620(c)(2) says projects should address key technical barriers, whereas in 25625(g) it says the proposal provides technical means to resolve scientific or technological barriers, which we think is a little broader and more consistent with the Strategic Plan.

We have some proposed language, which we will again docket, to try and address that issue. But the basic point here is move the project selection stuff into 25625.

On 25620(g), let me make sure I'm on the right page here, 25620(g), we wanted to add a phrase on leveraging public interest RD&D funds and we suggest that 25620(g)(3) be changed to read, "leveraging limited public interest RD&D funds through public/private partnerships as appropriate to the type and phase of RD&D project." Again, we believe this will increase the Commission's flexibility in administering this section here.

And 25626 on the multi-party agreements, we have proposed some more changes to explicitly include interagency agreements and to include among the purposes of such multi-party agreements minimizing duplicative research, enhancing state energy research infrastructure and facilitating planning efforts. And again, we have some language that we will docket for you.

On the question of reliability, and I know the Commission has taken up the issue before and had some resolution which it seemed to me that Todd's comments went a bit beyond. And I thought I heard Todd suggesting that you really amend 381(f) which is quite explicit, saying that T&D, that the amount to be allocated for public interest T&D is to be decided by the PUC; whereas Todd's proposal seems to explicitly give you responsibility for public interest T&D.

I think it's a mistake to tinker with that piece of legislation. If there's an opportunity for more dialog on this question, UC is certainly interested in participating in that.

PRESIDING COMMISSIONER ROHY: Questions?

COMMISSIONER LAURIE: Question to staff under 620 which talks about project portfolios, you're evaluating project portfolios. In one I do note the words "adhere to," and that to me is pretty prescriptive and does not give you flexibility. That is, these are basically findings that you almost have to make in order to uphold the evaluation of project portfolios.

Can somebody explain to me the relationship between 620 and 625? I understand they are intended to accomplish different purposes. On the other hand, in 620 you do have reference to the fact that the Commission shall adhere to the principle the project should address key technical barriers. Is, in fact, language like that duplicative of 625 or they are intend to be something entirely different?

MR. ABELSON: I can --

MR. DE ANGELIS: Let me --

MR. ABELSON: I can address that in terms of the history of that section, and

then, Mike, if you want to enter that as well.

MR. DE ANGELIS: You start and I'll fill in.

MR. ABELSON: Okay.

Basically the language, Commissioner, in Section 65625 [sic] was drafted in response to the advisory group report specifically, and then turned into appropriate legislative language to reflect that.

The language that you're referring to in 65620 [sic] was actually added, I believe, at the suggestion of Commissioner Rohy's office to capture some existing language that is currently in statute that governs public interest programs that the utilities have historically administered.

To the extent that there is duplication, I believe I would have to defer back to Commissioner staff and the Commissioner himself as to whether there is additional benefit. But I do think that the intent here was to reflect back the Legislature longstanding policies that they've had, as well as those policies contained in the working group report. So that's the only insight I can shed on that.

MR. TANTON: Maybe I can add just a little bit to that, Commissioner Laurie.

This particular section in 25620 is really an attempt to state what we believe is the legislative or would be the Legislature's intent. This is contained in the part of the bill which is most often referred to as intent language. And it sets forth general level of principles and desires and policy.

The later 625 section refers to how we would go about carrying out that legislative intent.

Many of the folks involved in R&D over the years will recognize the 620(c), items (1) through (4) basically as a restatement of the existing Public Utilities Code Section 740.1 which put constraints on the utilities in terms of how they would go about and how they would be

allowed to go about spending ratepayer funds for research and development.

MR. DE ANGELIS: I would merely add to all that, and I hope this doesn't get too confusing, but the entire Section 25620(a) through (h) and Section 25625 are different in terms of their scope.

Certainly this is to respond to AB 1890 and the requirement for administration and expenditure criteria for the program. Discussions with stakeholders in the workshop led that group to propose the overriding mission and objectives for the program, again, at a general level, and then also to discuss more specific criteria that could be used to evaluate proposals.

Section 25620(a), in effect, is the mission statement, which is the broadest of all statements for the program that was developed; (b) through (h) are the objectives that were developed.

Section 25625 are very specific to proposals that would come into the program and list in a flexible way a variety of criteria which could be used to evaluate those specific proposals.

PRESIDING COMMISSIONER ROHY: Nonetheless, excuse me.

MR. BLUMSTEIN: Let me address the kind of key issue here, which would seem to be that the (c)(2) projects with the very specific criteria applied to projects, projects should address key technical barriers. And this might be read as saying that things such as behavioral issues in energy use would be outside the scope of program.

And in fact, I believe it has been used to argue that in its PUC context. You can't do social science if it's a technical barrier. Social science is not about technical barriers.

So that raised something of a flag within the University, because we think that there's a wide scope for social science research in this area, and that's why we preferred 25625(g) which is less specific than 620(c)(2). And we would urge you to strike (2). In fact, 625(g) does address that issue, but is much less restrictive. Unless there is some compelling reason to restrict

the scope at this point in the legislation, I wouldn't do it.

MR. TANTON: Would it address your concern then, Mr. Blumstein, if (c)(2) were broadened in some fashion to make sure basically two things: One, that it be applied on a programmatic basis; and two, that it not be written in a way which would be read to exclude the non-hardware technological kinds of solutions?

MR. BLUMSTEIN: Yes, I think so.

MR. TANTON: Okay.

MR. BLUMSTEIN: Although I believe the easy way out is to strike it, Tom, and you've got it in 625.

PRESIDING COMMISSIONER ROHY: To me, the value of a workshop like this is just discussions like we've had. If there's obviously people that have misunderstandings from one section to another, I certainly find it useful to me to hear the various views on this to see whether they comport one with another, and in fact do follow the intent of what we are trying to do.

Language can be twisted so many ways, especially by physicists, since that's my background.

MR. BLUMSTEIN: I'm a chemist.

[Laughter]

PRESIDING COMMISSIONER ROHY: Don, I was --

MR. TANTON: I knew there was something about you I liked.

PRESIDING COMMISSIONER ROHY: -- referring to my own training, not yours.

DR. AITKEN: I know.

PRESIDING COMMISSIONER ROHY: I understand and I do appreciate

this type of discussion. Thank you for bringing it to us.

Do you have other comments?

MR. BLUMSTEIN: No.

PRESIDING COMMISSIONER ROHY: Thank you very much.

Drake Johnson had a “possibly” down here. Do you wish to speak? That’s a no.

Dan Whitney of SMUD.

MR. WHITNEY: Good afternoon.

A couple of very brief comments here, specifically addressing Section 25625. I know we’ve been talking about that, but as we go through here I think we might consider that this section is a little bit too loose and a little bit too specific all at the same time.

To start off with in the introductory sentence there where it says “The criteria to evaluate proposals for funding may include...” That could be more specific to “shall include.” And I think it would be better with the intent that we had.

As you go then to paragraph (a), it says that the proposal is consistent with state energy policies. And we’ve talked a lot about that. But where are they? Where do they come from? And we know that they are going to be changing.

But as we go into this program, we are really talking about four focus areas that have been quite nicely elaborated on in terms of where there are some objectives there. So maybe that section is a little bit too loose and could be tightened up by being specific to the four focus areas.

With respect to paragraphs (b) through (f), these appear to be very specific, as we’ve just been talking, and maybe what we could do is recast those in a forum that would be for the good of public benefit. In other words, state them in ways that it’s the outcome we’re looking for rather than the specifics of how it would be accomplished.

Changing then to Section 25630. This section really appears to be the only place that we deal with administrative cost or program cost for the overall statewide effort. The concern we have here is with respect to the overhead cost of administering this RD&D program.

Maybe this is not the right place for it, but I think it is as close as we really can get. And what there needs to be is some guidance in terms of how much of the fund is going to be used for program administration. I know that a lot of work has been done to investigate what typical models are, and there is no good single answer. But I think that as a statewide program at its inception there should be some guidance provided in terms of how much we expect to spend for administrative aspects.

PRESIDING COMMISSIONER ROHY: You have suggested language there?

MR. WHITNEY: Well, SMUD uses six percent, so we can use that as a target.

MR. TANTON: Mr. Whitney, in our discussions with various folks about administrative overhead, we've heard numbers ranging pretty much all over the map partly because folks charge different amounts, but also because folks tend to include different items in what they refer to as "overhead."

Not wanting to discuss SMUD's six percent, I wonder if in the next few days you could provide the Committee with a list of what activities that includes so that we can, you know, sort of distinguish it in some fashion?

MR. WHITNEY: I know staff has those figures already. There was a survey done months ago and we contributed our information at that time.

And I agree with you. There is no good single answer, but I think that in this legislation there should be some guidance provided in terms of the types of things that should be charged and some assessment of how many of those dollars actually get out to the R&D

community to do work.

Thank you.

MR. TANTON: Thank you.

PRESIDING COMMISSIONER ROHY: Appreciate your comments, Dan.

Do you have those data, Mike DeAngelis?

MR. DE ANGELIS: We certainly did the survey, but I do not recall -- I certainly have not seen any detailed explanation of what's included in the six percent SMUD numbers. So I have not seen those yet, so --

PRESIDING COMMISSIONER ROHY: Rather than get into -- excuse me.

MR. DE ANGELIS: -- I would appreciate seeing that too to understand that better.

PRESIDING COMMISSIONER ROHY: And if I could reword the request, rather than "What is in SMUD's six percent?" then "What do you recommend to be in ours and for how much?" rather than getting into your business. I'd appreciate your recommendations.

MR. WHITNEY: [Mr. Whitney nods in the affirmative.]

PRESIDING COMMISSIONER ROHY: I'm sorry, I skipped you for a question.

Tom Willoughby of PG&E.

MR. WILLOUGHBY: Thank you, Mr. Chairman.

Just so that I'm very clear in my own mind, we are addressing the May 14 draft. I think I'll refer back to the comments I made at the Commission's Business Meeting.

First of all, we expressed our concerns there about in the context of the document, the report, about the reliability issue and the language which was seemingly equated reliability only to distributed generation, and I think the Commission has taken those comments into account and

have made a policy decision with respect to that.

I will focus my comments today then basically, while underscoring that that is still a consideration and a concern of PG&E's, that the policy decision of the Commission be accurately and faithfully translated into legislation. While making that statement then I will just run through what I think are hopefully some helpful mainly technical suggestions about this draft.

And you are going to have to excuse me. I hope you will excuse me if I play the role of kind of the skunk at the family picnic here. Because I'll honest with you, from a drafting point of view I don't think very much of this draft. So that's my bias, and that's how I begin.

PRESIDING COMMISSIONER ROHY: Well, that's why we're holding the workshop today to get that type of input from everyone. Well not that specific input, but input from everyone.

MR. WILLOUGHBY: You've probably heard this before, but gratuitous comment on your first Section 384, and that is figure out a way to do this without using the dreaded phrase "continuous appropriation." That is going to be dead on arrival. That's just a gratuitous comment.

In terms of the next section, this whole chapter you're adding to the Public Resources Code, 25620, I think, suffers from what I think is a very serious drafting deficiency. It commingles intent and operative language.

If you look down at the various paragraphs, your first couple of paragraphs are clearly intent language, and then you get into down in paragraph (d) "the Commission shall" operative language. I think from a point of view of simple drafting what you really want to do is to have a statement of legislative intent, a section that has several paragraphs stating legislative intent, and then you go to the operative sections. And the operative section says, you know, in order to implement this provisions of the intent language, the Commission shall do X. But you have to

have that linkage, I think, in order to provide some clear guidance.

And I want to comment just on a couple of things which puzzled me. In 25620(c) -- I'm sorry, 25620(b), the second sentence it talks about initial focus areas should include all these things. It ends up so that it reads initial focus areas should include, dot-dot-dot, environmental issues.

I am not sure what it means to say that focus areas should include environmental issues. So I suggest that there may be some attention given to that.

That same section, paragraph (c)(1) which talks about public portfolios resulting in a balance of benefits to all sectors that contribute to funding under Public Utilities Code 381. Well, as I read 381, the people who make the contribution, everybody who pays an electric bill. And what it means to say that project portfolios should result in a balance of benefits to all these people -- I don't know. I don't know whether you mean that the people who pay the most, the big users, should get the most benefit, or what. So I suggested that there is some clarity lacking there.

Paragraph --

PRESIDING COMMISSIONER ROHY: Excuse me. Do you have in that particular case an alternative?

MR. WILLOUGHBY: No, for the main reason I don't know what your intent is.

PRESIDING COMMISSIONER ROHY: Thank you.

MR. WILLOUGHBY: I think if I might be able to make a constructive suggestion if I knew what the intent really was here.

PRESIDING COMMISSIONER ROHY: Okay.

MR. WILLOUGHBY: With respect to paragraph (d), again, I'm not sure how public interest RD&D is going to contribute to people making more intelligent choices about the

energy services they wish to purchase. I don't see the nexus there. But maybe my glasses need cleaning. I just don't see how this knowledge base and the information dissemination is going to contribute to people, you know, choosing Company A to be their service provider over Company B.

I would point out in over in 25624 there is a reference there to definitions of public interest activities that are found in subdivisions (b) and (f) of Section 381. There aren't any definitions in 381.

So I don't know what again you mean there, but if you want to define public interest activities I think you're going to have to do it -- either refer to someplace where it is defined or you are going to have to come up with definitions of your own.

What I find at least conceptually very troubling is the next Section 25625 which sets out the criteria to be used in judging projects. It's a long list of criteria, but what bothers me most is it doesn't give the applicant any clear idea of what criteria you're going to use to judge that application.

If you boil it down to simple everyday English, it really says that when we look at your application, Mr. Willoughby, we can use any of these criteria, or if we don't like them all we can throw them out and use some other criterion or criteria that we may happen to think of.

I don't think it's going to be an easy task to figure out what criteria you are going to use. But I think the criteria should be spelled out.

And I would endorse the SMUD comment about whether the proposal is consistent with energy policy in paragraph (a) under there. I mean there isn't any compendium of energy policies that I know of where an applicant can point to his or her application and say, "Yes, it is consistent with these energy policies." Just another area I think where some attention is given.

Those are the extent of my basic comments. Just to reiterate and to close, from a

policy point of view, we are simply interested in moving forward with the policy decision on reliability that was made at the last Business Meeting. From a technical point of view we'd like to get as clear and understandable a draft as possible.

I'll be happy to answer any questions you have.

PRESIDING COMMISSIONER ROHY: Thank you for your very complete comments here.

I believe, Commissioner, do you have a question?

COMMISSIONER LAURIE: No, I don't.

PRESIDING COMMISSIONER ROHY: Mr. Tanton does, I believe, Mr. Willoughby.

MR. TANTON: Yes, I have one. With respect to 625, the project selection criteria.

MR. WILLOUGHBY: Yes.

MR. TANTON: It sounds like we have perhaps two options to improve this section consistent with your comments. One would be to make the criteria more specific along the lines that Mr. Whitney alluded to, that the criteria should include or shall include or some sort of thing.

I think the dilemma that was attempted to be addressed in the original drafting was some solicitations may focus on some of these criteria, not others. Other solicitations would select from a different group.

I wonder what your opinion would be that the language here essentially referred to a process where the Commission would articulate any particular solicitation's criteria consistent with the Strategic Plan adopted last week, and allow for some period of public comment so that the proposers who would be sending in proposals for funding would have at that point a very clear list

and an exclusive and all inclusive list of criteria for that particular solicitation cycle.

MR. WILLOUGHBY: That might work. Again, I think I'd like to see the, you know, it need not be draft language, but --.

Let me just have an aside here. My view of how to draft is you right stuff out in simple English and get agreement on that. And then you get a drafter to actually put it in technical language.

But I think, if I understand what you're saying, that it might work. My concern only was in suggesting that an applicant ought to know that these four or five criteria will be used to judge my application, and not be kind of left in limbo that, gee, here's my application and I don't know what criteria they are going to use to judge it.

So what you suggest, I think it --

MR. TANTON: It could be evaluated further.

MR. WILLOUGHBY: It could work.

MR. TANTON: Okay.

PRESIDING COMMISSIONER ROHY: Maybe I captured what the discussion led to, and see if I could reiterate this as perhaps there are four or five universal criteria, like merit. We are going to base the winners on merit, just to pick on that's probably the least controversial, I hope. And then a process that would be spelled out for the individual RFPs to more fully, we would say there would be a public process to define what those specific items would be for that RFP.

MR. WILLOUGHBY: I think, if I -- let me repeat it and make sure I understand you.

I think you're saying that there will be four or five universal criteria to say that a project shall meet the

following --

PRESIDING COMMISSIONER ROHY: Yes.

MR. WILLOUGHBY: -- four criteria. And then you would have to say in addition there will be other project-specific criteria developed for that project area. Something like that.

PRESIDING COMMISSIONER ROHY: That's --

MR. WILLOUGHBY: I think that would work well, I think, conceptually.

MR. DE ANGELIS: In fact, that actually does, is consistent with the Strategic Level Plan that the Commission adopted where it had all of these very specific criteria and I believe four or five categories.

PRESIDING COMMISSIONER ROHY: Appreciate your comments.

MR. WILLOUGHBY: Thank you very much.

PRESIDING COMMISSIONER ROHY: Bob Judd.

MR. JUDD: Thank you, gentlemen. One of the great difficulties coming near the end of the day is that most of the ideas one thought were great ideas early on have already been spoken by others.

There are three brief points I would like to make, and these will be in our written comments as well.

We have some of the same difficulties that Tom Willoughby points out with the language in the bill. The intentions are quite good. It's based on a commonality of understanding within this group, but in translation to the Legislature there is certainly areas where the language needs to be tightened up.

That idea that Al Pak brought up I think is one that's very important. We see, in dealing with the renewables side of AB 1890 implementation, that this idea of a continuous

appropriation both is very critical, particularly to those of us who run facilities day by day it is just simply a cash flow issue and a substantial cash flow issue. But it's found significant resistance at the Legislative staff level. And I'd say that it's a very small likelihood that continuous appropriations would be granted.

Al suggested that perhaps one way around that was in the creation of the trust to create trusts at the utilities, investor-owned utilities themselves rather than at the PUC, that might have been a mechanism. That may work and it may not work.

I'd suggest, however, if thinking does go in that direction that to be fiscally responsible you have to think about the float as well. There's significant revenues gained on money held in trust, and they should accrue to the R&D portfolio rather than to the trustee for other purposes. And that probably should be addressed.

Finally, and without a lot of detail, as we testified in our last commentary before this group, we continue to feel very strongly opposed on behalf of all of the existing renewables to any sort of pre-allocation methodology on this reliability issue. All dollars should be allocated fair and square. At the same time, we are not quite sure what pre-allocation methodology means, but we don't have any idea about how many dollars are involved in it. But it's such a level of euphemism at this point that it makes us enormously fearful.

PRESIDING COMMISSIONER ROHY: I think I've been sensitized to the issue.

MR. JUDD: Thank you very much.

PRESIDING COMMISSIONER ROHY: Thank you very much.

I'm out of blue cards. So I'd like to ask for a more general show of hands. Are there others who wish to comment on the legislation at this point?

Certainly, Carl.

MR. WEINBERG: Commissioner, I thank you for the opportunity to speak. I really wasn't going to say anything because my views on the reliability issue are well known. I just couldn't sit here and not say something.

It's clear to me in reading AB 1890 and listening to the debate that there was a perception that there would competition, and competition would have its own R&D, and it would be regulated, and regulated would have its R&D, and that the Legislature in their wisdom accepted the challenge of the reduction in public interest R&D by the utilities by establishing a public interest R&D program.

Now to shift, at least the way I understood the proposal by Southern Cal Edison, to shift the regulated R&D to the public interest program appears to me to be a means of shifting responsibility and dollars from shareholders to customers. And I have a hard time trying to understand where that comes from.

I think reliability to me is like reducing cost. I think it's in the public interest to reduce cost, yet we're not making a focus area out of reducing costs in that sense.

So I just wanted to urge you to be even more sensitive to the issue of reliability and its interpretation in the concept of the public interest.

Thanks.

PRESIDING COMMISSIONER ROHY: You're honing it to a razor's edge.

MR. WEINBERG: I was going to be quiet.

PRESIDING COMMISSIONER ROHY: I always appreciate your comments, Carl.

Are there other members of the public who wish to comment at this point?

[No response]

PRESIDING COMMISSIONER ROHY: May I ask staff if they have

closing comments, and then Commissioner Laurie and I will close.

MR. ABELSON: I only have one thing to mention, Commissioner.

We had talked about the need for support and in the legislation, notwithstanding the fact that there were certain areas where people are continuing to have their disagreement, there does appear to be broad support for the legislation overall. And I don't think anything we heard today is to the contrary.

I know that you've had an opportunity through your advisor to look over a document I provided you, and I don't know whether you want to speak to that or not.

PRESIDING COMMISSIONER ROHY: Thank you.

Before I do that, are there other comments?

MR. DE ANGELIS: Well, just in terms of staff comments I would want to restate that if there are others who wish to provide written comments, we would like those by the end of the week so that we can appropriately consider those.

And then I think we've got a fair amount of work to do to compile those comments and discuss them and evaluate the draft legislation and make changes accordingly.

PRESIDING COMMISSIONER ROHY: Thank you.

I'd like to thank everyone who took their time to be here today and provide us comments. It is very useful to myself. And I'm sure Commissioner Laurie will probably second this when he gets his opportunity in a moment, that this is the type of cooperative work that we need to make sure that the program is effective and does start on January 1. And so all of your effort is greatly appreciated to be here.

Mr. Abelson put together a letter which we will make available which is something that you could tailor to your own wishes if you wish to use it. It's just a triable. To support this we would hopefully have our -- let me say something here that we haven't talked about before. So

I'll go out on a limb.

We need to re-work our draft language probably in the next week. That's a guess. Is there any guess on when we might have it available for other people to see?

MR. DE ANGELIS: Well, I would expect some of this depends on the availability of the Committee for discussion. But since comments could come in until the end of this week for us to consider, that I would think we would need at least one more week of discussions, I think, of the Committee and staff, between the Committees and staff to come up with final agreed upon language to make a final draft available.

PRESIDING COMMISSIONER ROHY: Okay.

I am joining the Chairman on a journey to Washington for the remainder of the week. So on my return next week we shall first thing take a look at this.

MR. DE ANGELIS: Okay.

PRESIDING COMMISSIONER ROHY: But there are letters which are available here and I will have staff take those out and make them available. That is obviously at your total discretion. It's just something that would help move the program along.

And again, we would try to get this out as soon as possible.

Commissioner Laurie, do you have comments you would like to make as a result of this workshop?

COMMISSIONER LAURIE: I just want to thank you, Commissioner Rohy. Up until recently you yourself have taken prime responsibility and have conducted the predominant effort in getting this work out, and it was done well. It's understood that when you're creating a new package of legislation as opposed to simply modifying existing legislation, well, it's difficult. Because each word counts and there are a lot of words and a lot of thoughts. And I think this kind of workshop is very helpful to get us to think about what perhaps we thought we did before.

So I'm looking forward to the next round, and thank you folks.

PRESIDING COMMISSIONER ROHY: This concludes the workshop.

Thank you very much.

[Whereupon the Committee Workshop was concluded at 3:00 p.m.]

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